Supreme Court, U.S.
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No. 92-1431

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

EDWARD MATHEWS, BEARL MATHEWS, NEHEMIA MATHEWS, NATHAN MATHEWS and JAMES MATHEWS,

Petitioners,

v.

HARRIS METHODIST, FORT WORTH, A NON-PROFIT CORPORATION; TARRANT-PARKER COUNTY MEDICAL EXAMINERS DISTRICT; and LIONS ORGAN AND EYE BANK, DISTRICT 2E2, INC., A TEXAS CORPORATION,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Texas

BRIEF IN OPPOSITION OF RESPONDENT HARRIS METHODIST, FORT WORTH

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Petitioners,

v.

HARRIS METHODIST, FORT WORTH, A NON-PROFIT CORPORATION; TARRANT-PARKER COUNTY MEDICAL EXAMINERS DISTRICT; and LIONS ORGAN AND EYE BANK, DISTRICT 2E2, INC., A TEXAS CORPORATION,

Respondents.

BRIEF IN OPPOSITION OF RESPONDENT HARRIS METHODIST, FORT WORTH

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES, AND TO THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

MAY IT PLEASE THE COURT:

Respondent, Harris Methodist, Fort Worth, a non-profit corporation,[1] respectfully presents its Brief in Opposition to the Petition for Writ of Certiorari:

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[1] Disclosure required by Rule 29.1: Harris Methodist, Fort Worth is a Texas non profit corporation which operates a large acute care hospital. While it has no corporate parents or subsidiaries, it is controlled by Harris Methodist Health System, a non profit corporation.

STATEMENT OF THE CASE

Petitioners' Statement of the Case is correct as far as it goes. However, Petitioners fail to mention the core undisputed adjudicative facts: At all relevant times, Petitioners were represented by counsel of their choice. Counsel moved his office during the pendency of the case and consciously failed to give the Court and opposing counsel notice of the change as required by Rule 8, Texas Rules of Civil Procedure.[2] Both the Trial Court and the Court of Appeals found this behavior to be negligent. *Mathews v. Harris Methodist, Fort Worth*, 834 S.W.2d 582, 585 (Tex. App.-Ft. Worth 1992, *writ denied*).

SUMMARY OF THE ARGUMENT

The Court should deny the Writ of Certiorari because Petitioners seek that Writ under the wrong statute and directed to the wrong Court. Moreover, granting the Writ and reversing the decision below would require the Court to depart from its policy of not reversing factual determinations of lower courts. The present case is distinguishable from *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 108 S. Ct. 896, 99 L.Ed.2d 75 (1988), in several particulars, the most important of which is that in the present case, Petitioners were in court as plaintiffs represented by counsel of their choice. Their case was dismissed because of that attorney's negligence. This Court's decisions uniformly charge civil litigants with the consequences of their attorneys' acts. The applicable Texas Rules and procedures afford procedural due process to litigants in general and to Petitioners in

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[2] Appendix, p. 1a.

this case. The relief which Petitioners seek, if granted, would effectively eliminate final dispositions of matters where there was inexcusable neglect by an attorney. Relief would call into question many statutes of repose, several decisions of this Court, and the jurisprudence developed since 1938 under Federal Rule of Civil Procedure 60(b)(6).

I. PETITIONERS SEEK TO INVOKE JURISDICTION UNDER THE WRONG STATUTE AND SEEK TO OBTAIN A WRIT OF CERTIORARI DIRECTED TO THE WRONG COURT.

The Petition asserts that jurisdiction is conferred by 28 U.S.C. § 1254(1).[3] That claim is erroneous on its face, because § 1254 deals with jurisdiction to review cases pending in the Federal Courts. Since the present case comes from the State Courts of Texas, this Court's jurisdiction, if it exists, exists under 28 U.S.C. § 1257(a). Moreover, Petitioners seek a Writ directed to the wrong Court.[4] If this Court were to grant a Writ directed to the Supreme Court of Texas as requested by Petitioners, the Court might inadvertently create the same sort of time consuming procedural morass reflected in the opinions in *Callender v. Florida*, 380 U.S. 519, 85 S. Ct. 1325, 14 L.Ed.2d 265 (1965) and 383 U.S. 270, 86 S. Ct. 924, 15 L.Ed.2d 749 (1966).

In the present case, the Court of Appeals for the Second Appellate District of Texas is the highest Court which decided the case. The Orders of the Supreme Court of Texas merely denied review. Moreover, as mandated by Rule 134, Texas Rules of Ap-

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[3] Petition for Writ of Certiorari ("Petition"), p. 4.

[4] Petition, caption, p. 1 and p. 29.

pellate Procedure,[5] the Appellate Record is in the possession of the Clerk of the Court of Appeals for the Second Appellate District at Fort Worth rather than in the possession of the Clerk of the Supreme Court of Texas.

Respondent does not claim that invoking jurisdiction under the wrong statute or seeking a writ directed to the wrong Court forecloses review by this Court. However, we do believe that these are matters which are required to be brought to the Court's attention under Rule 15.1. Improper invocation of the Court's jurisdiction and seeking a writ directed to the wrong Court are grounds for denying Certiorari. Both errors are indicative of the general lack of merit in the Petition.

II. PETITIONERS IMPROPERLY ASK THIS COURT TO REVERSE A CONCLUSIVE EVIDENTIARY FINDING BY THE TEXAS COURTS.

In the present case, the Court of Appeals made a conclusive factual determination:

> "We hold that the evidence is sufficient and does support the trial court's finding that Appellants were negligent because there was evidence that the case remained inactive for at least a year and Appellants failed to give the District Court Clerk notice of their most recent mailing address." *Mathews*, 834 S.W.2d at 585.

Under Texas law, the Supreme Court of Texas is without jurisdiction to review factual determinations of the Courts of Appeals. Tex. Gov't Code Ann. §

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[5] Appendix, p. 2a.

22.001 (Vernon 1988).[6] *See also, Chicago, Rock Island & Gulf Railway Company v. Harris*, 119 Tex. 65, 245 S.W.2d 385 (Tex. 1930), *Anderson, Clayton & Co. v. State*, 122 Tex. 530, 62 S.W.2d 107 (Tex. 1933); *Harmon v. Sohio Pipeline Co.*, 623 S.W.2d 314 (Tex. 1981).

As we demonstrate at Section IV *infra*, the finding of negligence by the Trial Court, affirmed by the Court of Appeals, is the central reason Petitioners' Bill of Review was denied in the Texas Courts. This Court can order the Texas Courts to grant a Bill of Review on this Record only if this Court substitutes its view of the evidence and of its sufficiency for demonstrably correct fact findings by those Courts.[7] That sort of evidentiary second guessing is generally contrary to this Court's stated policies. *National Labor Relations Board v. Pittsburg Steamship Company*, 340 U.S. 498, 71 S. Ct. 453, 95 L.Ed. 479, 482-483 (1951) (Frankfurter, J.).

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[6]Appendix, pp. 3a-4a.

[7] That there was ample evidentiary support for the Court's negligence finding cannot be doubted. Petitioners' trial counsel failed to notify the Court and the other parties of his change of address as Rule 8, Texas Rules of Civil Procedure, required him to do. Texas attorneys are charged with the standard of care of what a reasonably prudent attorney would have done under the same or similar circumstances. There is a quadripartite test for recovering monetary damages for an attorney's malpractice. The plaintiff must prove: (1) that the defendant owed a duty to the plaintiff; (2) that the defendant breached the duty; (3) that the breach of duty proximately caused plaintiff's injury; (4) damages resulted. Proximate causation encompasses both cause in fact and foreseeability. *Cosgrove v. Grimes*, 774 S.W.2d 662, 664 (Tex. 1989); *accord, Simpson v. James*, 903 F.2d 572 (5th Cir. 1990). Since the present case was not a malpractice case, the damage issue was not before the lower courts.

III. EVEN IF THIS COURT WISHES TO ANNOUNCE A NEW RULE RELIEVING LITIGANTS FROM THE CONSEQUENCES OF THEIR ATTORNEYS' NEGLIGENCE, THE PRESENT CASE IS NOT THE APPROPRIATE VEHICLE FOR THE CHANGE.

Petitioners endeavor to bootstrap the negligence of their chosen attorney into a deprivation of Fourteenth Amendment procedural due process. The attempt, while ingenious, is bizarre. It is the functional equivalent of the apocryphal tale of the parricide throwing himself on the mercy of the jury because he is an orphan. In civil cases, this Court has been unwavering in its view that litigants are bound by the acts of their attorneys. Both the rule and the reason have never been more clearly stated than in the oft cited opinion of Justice Harlan in *Link v. Wabash Railroad Company*, 370 U.S. 626, 82 S. Ct. 1386, 8 L.Ed.2d 734 (1962):

> "There is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose his attorney as his representative in the action, and he cannot now avoid the consequences of the acts of omission of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.' *Smith v. Ayer*, 101 US 320, 326, 25 L ed 955, 958." *Link*, 370 U.S. at 633-634, 8 L.Ed.2d at 740 (Footnote omitted).

In the omitted Footnote, the Court points out that the remedy for a party whose attorney has been negligent is a suit for malpractice. Other relief such as keeping the suit alive in order not to penalize a litigant for his attorney's negligence would amount to "visiting the sins of plaintiff's lawyer upon the *defendant*" *Link*, 370 U.S. at 633-634, 8 L.Ed. at 740 n. 10 (emphasis in original). In the case at bar, there is not even a superfically plausible explanation for Petitioners' counsel's failure to inform the Court of his change of address. There is not a hint of interference, overreaching, or bad faith by Respondent. In fact, there are findings to the contrary. *Mathews*, 834 S.W.2d at 584. This Record is not one on which to abrogate a longstanding rule and to announce that henceforth due process mandates that the Courts of the several States relieve litigants from the consequences of egregious breaches of duty by their freely chosen attorneys.

IV. THIS COURT'S DECISION IN *PERALTA* MANDATES NEITHER GRANT OF THE WRIT NOR REVERSAL OF THE COURTS BELOW.

From the time their new counsel discovered that the case had been dismissed, Petitioners have consistently attempted to analogize themselves to the successful petitioner in *Peralta, supra*. Their effort must continue to fail because the analogy is not apt. We have already demonstrated that the present case is a case of inexcusable attorney neglect rather than the case of an opposing party or a clerk failing to give notice.[8] In addition to this most important distinction and to those drawn by the Court of Appeals

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[8] *See* Sections II & III, pp. 4-7 *supra*.

in its opinion[9], *Peralta, supra*, cannot be stretched to afford Petitioners any relief. Moreover, the decisions of the Supreme Court of Texas in *Lopez v. Lopez*, 757 S.W.2d 721 (1988) and in denying review in the present case, conclusively demonstrate that the Texas Courts have understood the teaching of *Peralta* and have accommodated that teaching into Texas post-judgment relief procedures. This Court should require no more.

Properly understood *Peralta* stands for the proposition that in a case where a judgment is taken against a *non party* by a court without *in personam* jurisdiction, due process requires that a State provide a procedural mechanism for relief. There the Texas courts strictly construed the Texas requirements for granting a Bill of Review and denied relief to the non party.[10] This Court found that strict construction irreconcilable with its prior decisions requiring notice and an opportunity for hearing and concerning *in personam* jurisdiction, such as *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L.Ed. 865 (1950); *Armstrong v. Manzo*, 380 U.S. 545, 85 S. Ct. 1187, 14 L.Ed.2d 62 (1965); and *Pennoyer v. Neff*, 5 Otto 714, 95 U.S. 714, 24 L.Ed. 565 (1877). Thus, the Court held that Texas proce-

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[9] *See Mathews*, 834 S.W.2d at 584-585.

[10] Those requirements are classically set out in *Alexander v. Hagedorn*, 148 Tex. 565, 226 S.W.2d 996 (Tex. 1950). In order to obtain relief, a party must plead and prove: (1) a meritorious defense; (2) which he was prevented from making due to the fraud, accident or mistake of the opposing party; and (3) unmixed with any fault or negligence of his own. *Alexander*, 226 S.W.2d at 998. In *Peralta*, the non party could not show a meritorious defense.

dure, in order to comport with due process, must afford some means of relief to a non party against whom a judgment has been taken by a court without *in personam* jurisdiction.

Not only did the Texas Court immediately adopt the teachings of *Peralta*, but it took them further than a strict reading of the opinion requires. *Peralta* involved a final judgment against a non party. In contrast, *Lopez, supra*, involved a post-answer default judgment entered without notice against a *pro se* party.[11] In *Lopez*, the Supreme Court held that *Peralta* required relief to the *pro se* litigant who after default failed to establish a meritorious defense. *Lopez's* only real similarity to *Peralta* is that both litigants failed to set up a meritorious defense.

In contrast to both *Peralta* and *Lopez*, the present case turns neither on the merits of the underlying claim nor upon a failure to give or receive notice nor upon the fact that a party was *pro se*. The outcome of the present case in the lower courts was mandated by the negligence or fault of Petitioners' chosen counsel. The present Texas rule which can be redacted from *Alexander, supra, Peralta, supra, Lopez, supra,* and from decisions such as *City of Laredo v. Threadgill*, 686 S.W.2d 734 (Tex. App.-San Antonio 1985, *no writ*) and *Buddy "L", Inc. v. General Trailer Co.*, 672 S.W.2d 541 (Tex. App.-Dallas 1984, *writ ref'd n.r.e*) is that a litigant who has no notice of a dis-

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[11] Under Texas law, courts require the same basic showing on a motion to set aside a default judgment as they do to grant a Bill of Review. *Craddock v. Sunshine Bus Lines, Inc.*, 134 Tex. 388, 133 S.W.2d 124 (1939); *Bank One, Texas v. Moody*, 830 S.W.2d 81 (Tex. 1992).

missal for want of prosecution must seek reinstatement within a maximum of 120 days from the date of the signing of the order of dismissal or be relegated to seek reinstatement by means of a Bill of Review. To obtain a Bill of Review, the litigant must show a meritorious claim or defense which he was prevented from making by the fraud, accident, or mistake of the opposing party or of official clerical personnel as a consequence of an act of the opposing party and unmixed with any fault or negligence of his own, or that the litigant was, in fact, a non party, or that the litigant was not represented by counsel. If the Court were to grant Petitioners the relief they seek, one would be required to add this final proviso to the Texas rule: "Provided, however, in all cases where the judgment in question is as a result of attorney negligence, incompetence, sloth, or other inexcusable neglect, the Court shall grant relief from the judgment."

Texas procedures, as they now exist, that is, as modified by *Peralta*, interpreted by *Lopez*, and delimited by the decision below in the present case serve the same equitable function as Federal Rule of Civil Procedure 60(b)(6). Granting Petitioners the relief which they seek would call into question large numbers of State and Federal procedural deadlines and statutes of limitations. Relief would certainly vitiate a significant portion of the relatively stable body of case law which has grown up around Rule 60(b)(6) Fed.R.Civ.P. since 1938. *Link, supra*; *Ackermann v. United States*, 340 U.S. 193, 71 S. Ct. 209, 95 L.Ed. 207 (1950); *Klapprott v. United States*, 335 U.S. 601, 69 S. Ct. 384, 93 L.Ed.2d 266 (1949); *Crutcher v.*

AEtna Life Insurance Co., 746 F.2d 1076 (5th Cir. 1984).

Petitioners appear to urge that due process required Respondents to prove the Petitioners received notice of the Court's intention to dismiss and of the dismissal.[12] While that requirement would, no doubt, substantially increase postal revenues due to a vast increase in the use of certified mail, due process imposes no such requirement. If due process requires proof of actual receipt in all instances, the constitutionality of Rule 5(b), Federal Rules of Civil Procedure, and the parallel provisions of Texas Rules of Civil Procedure 21 and 21a[13] is doubtful. Neither actual receipt nor proof of actual receipt is required by due process under this Court's decisions. *Irwin v. Veterans Administration*, 498 U.S. 89, 111 S. Ct. 453, 112 L.Ed.2d 435 (1990).

Procedural limitations on the power of Courts to grant relief from final judgments such as those contained in Texas Rules of Civil Procedure 165a, 306a, and 329b(f) and in Federal Rule of Civil Procedure 60(b) are in the nature of statutes of limitation or statutes of repose and bring a necessary element of finality to civil litigation. Statutes of repose have long found favor with this Court. *Shipp v. Miller's Heirs, 2 Wheat 248*, 4 L.Ed. 316 (1817); *Wilson v. Iseminger*, 185 U.S. 55, 22 S. Ct. 573, 46 L.Ed. 804 (1902). The reason is not difficult to discern:

> "There must be an end to litigation someday, and free, calculated deliberate choices are not

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[12] Petition, pp. 27-28.

[13] Appendix pp. 5a-7a.

to be relieved from." *Ackermann*, 340 U.S. at 198, 95 L.Ed. at 211.

CONCLUSION

Respondent, Harris Methodist, Fort Worth, prays that the Petition for Writ of Certiorari be denied.

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APPENDIX

APPENDIX

RULE 8–TEX. R. CIV. P.

RULE 8. ATTORNEY IN CHARGE

On the occasion of a party's first appearance through counsel, the attorney whose signature first appears on the initial pleadings for any party shall be the attorney in charge, unless another attorney is specifically designated therein. Thereafter, until such designation is changed by written notice to the court and all other parties in accordance with Rule 21a, said attorney in charge shall be responsible for the suit as to such party.

All communications from the court or other counsel with respect to a suit shall be sent to the attorney in charge.

RULE 134–TEX. R. APP. P.

RULE 134. WHEN APPLICATION DENIED, DISMISSED OR REFUSED

When the application shall have been filed for a period of ten days, if the court determines to deny, refuse or dismiss the same, whether or not the respondent has filed a brief in response, the clerk of the court will retain the application, together with the record and accompanying papers, for fifteen days from the date of rendition of the judgment denying, refusing or dismissing the writ. At the end of that time, if no motion for rehearing has been filed, or upon the overruling or dismissal of a motion for rehearing, the Clerk of the Supreme Court shall transmit to the court of appeals a certified copy of the orders denying, refusing or dismissing the application and of the order overruling the motion for rehearing and shall return all filed papers to the Clerk of the Court of Appeals, except the application for writ of error, any brief in response and any other briefs filed in the Supreme Court.

SECTION 22.001—TEX. GOV'T CODE

§ 22.001. Jurisdiction

(a) The supreme court has appellate jurisdiction except in criminal law matters, coextensive with the limits of the state and extending to all questions of law arising in the following cases when they have been brought to the courts of appeals from appealable judgment of the trial courts:

(1) a case in which the justices of a court of appeals disagree on a question of law material to the decision;

(2) a case in which one of the courts of appeals holds differently from a prior decision of another court of appeals or of the supreme court on a question of law material to a decision of the case;

(3) a case involving the construction or validity of a statute necessary to a determination of the case;

(4) a case involving state revenue;

(5) a case in which the railroad commission is a party; and

(6) any other case in which it appears that an error of law has been committed by the court of appeals, and that error is of such importance to the jurisprudence of the state that, in the opinion of the supreme court, it requires correction, but excluding those cases in which the jurisdiction of the court of appeals is made final by statute.

(b) A case over which the court has jurisdiction under Subsection (a) may be carried to the supreme court either by writ of error or by certificate from the court of appeals, but the court of appeals may certify a question of law arising in any of those cases at any time it chooses. either before or after the decision of the case in that court;

(c) An appeal may be taken directly to the supreme court from an order of a trial court granting or denying

an interlocutory or permanent injunction on the ground of the constitutionality of a statute of this state. It is the duty of the supreme court to prescribe the necessary rules of procedure to be followed in perfecting the appeal.

(d) The supreme court has the power, on affidavit or otherwise, as the court may determine, to ascertain the matters of fact that are necessary to the proper exercise of its jurisdiction.

RULE 21—TEX. R. CIV. P.

RULE 21. FILING AND SERVING PLEADINGS AND MOTIONS

Every pleading, plea, motion or application to the court for an order, whether in the form of a motion, plea or other form of request, unless presented during a hearing or trial, shall be filed with the clerk of the court in writing, shall state the grounds therefor, shall set forth the relief or order sought, and at the same time a true copy shall be served on all other parties, and shall be noted on the docket.

An application to the court for an order and notice of any hearing thereon, not presented during a hearing or trial, shall be served upon all other parties not less than three days before the time specified for the hearing unless otherwise provided by these rules or shortened by the court.

If there is more than one other party represented by different attorneys, one copy of such pleading shall be delivered or mailed to each attorney in charge.

The party or attorney of record, shall certify to the court compliance with this rule in writing over signature on the filed pleading, plea, motion or application.

After one copy is served on a party that party may obtain another copy of the same pleading upon tendering reasonable payment for copying and delivering.

RULE 21a—TEX. R. CIV. P.

RULE 21a METHODS OF SERVICE

Every notice required by these rules, and every pleading, plea, motion, or other form of request required to be served under Rule 21, other than the citation to be served upon the filing of a cause of action and except as otherwise expressly provided in these rules, may be served by delivering a copy to the party to be served, or the party's duly authorized agent or attorney of record, as the case may be, either in person or by agent or by courier receipted delivery or by certified or registered mail, to the party's last known address, or by telephonic document transfer to the recipient's current telecopier number, or by such other manner as the court in its discretion may direct. Service by mail shall be complete upon deposit of the paper, enclosed in a postpaid, properly addressed wrapper, in a post office or official depository under the care and custody of the United States Postal Service. Service by telephonic document transfer after 5:00 p.m. local time of the recipient shall be deemed served on the following day. Whenever a party has the right or is required to do some act within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon by mail or by telephonic document transfer, three days shall be added to the prescribed period. Notice may be served by a party to the suit, an attorney of record, a sheriff or constable, or by any other person competent to testify. The party or attorney of record shall certify to the court compliance with this rule in writing over signature and on the filed instrument. A certificate by a party or an attorney of record, or the return of an officer, or the affidavit of any person showing service of a notice shall he prima facie evidence of the fact of service. Nothing herein shall preclude any party from offering proof that the notice or instrument was not received, or, if service was by mail, that it was not received within three

days from the date of deposit in a post office or official depository under the care and custody of the United States Postal Service, and upon so finding, the court may extend the time for taking the action required of such party or grant such other relief as it deems just. The provisions hereof relating to the method of service of notice are cumulative of all other methods of service prescribed by these rules.